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8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION
11

12 PETER GALLAGHER, an individual

13 Plaintiff,

14 v.

15 LIONS GATE ENTERTAINMENT
INC., a Delaware corporation; LIONS
16 GATE FILMS INC., a Delaware
corporation; MUTANT ENEMY, INC.,
17 a California corporation; JOSEPH
“JOSS” WHEDON, an individual;
18 ANDREW GODDARD, an individual;
and DOES 1 through 50, inclusive,
19

20 Defendants.

CASE NO. 15-CV-02739-ODW-E

The Honorable Otis D. Wright II

**DEFENDANTS’ NOTICE OF
MOTION AND MOTION TO
DISMISS THE FIRST AMENDED
COMPLAINT IN ITS ENTIRETY
WITH PREJUDICE PURSUANT
TO FEDERAL RULE OF CIVIL
PROCEDURE 12(b)(6)**

**[[Proposed] Order; Request for
Judicial Notice; Declaration of
Elaine K. Kim; and Notice of
Manual Filing Filed Concurrently
Herewith]**

Date: June 29, 2015
Time: 1:30 p.m.
Crtm: 11 – Spring Street

NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 29, 2015, at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 11, located at 312 N. Spring Street, Los Angeles, CA 90012, Defendants Lions Gate Entertainment Inc., Lions Gate Films Inc., Mutant Enemy, Inc., Joseph “Joss” Whedon, and Andrew Goddard will and hereby do move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing, with prejudice, in their favor Plaintiff Peter Gallagher’s First Amended Complaint in its entirety.

This Motion is made on the grounds that Plaintiff’s claim for copyright infringement fails because the works at issue, as a matter of law, are not substantially similar in copyrightable expression, and Plaintiff’s allegations fail to establish any reasonable possibility of access to his work. This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on May 1, 2015 and May 21, 2015.

This Motion is based upon this Notice of Motion; the attached Memorandum of Points and Authorities; the concurrently submitted Request For Judicial Notice and Declaration of Elaine K. Kim and exhibits thereto; all pleadings and other records on file in this action; and such further evidence and arguments as may be presented at or before any hearing on the Motion.

DATED: June 1, 2015

Respectfully submitted,

MITCHELL SILBERBERG & KNUPP LLP

By: /s/ Robert H. Rotstein

Robert H. Rotstein

Elaine K. Kim

Attorneys for Defendants Lions Gate Entertainment Inc., Lions Gate Films Inc., Mutant Enemy, Inc., Joseph “Joss” Whedon, and Andrew Goddard

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I. INTRODUCTION

Plaintiff Peter Gallagher’s First Amended Complaint for copyright infringement fails as a matter of law because he has not alleged that Defendants had access to his book *The Little White Trip: A Night in the Pines* (“*Little White Trip*”), or that Defendants’ motion picture *The Cabin in the Woods* (“*Cabin*”) is substantially similar in copyrightable expression to *Little White Trip*. The Court must dismiss the First Amended Complaint if it concludes that Plaintiff has failed to plead either element; in this case, Plaintiff has failed to plead both.

First, Plaintiff has failed to plead access—*i.e.*, that Defendants had a reasonable opportunity to read his book. Plaintiff bases his access theory solely on the assertion that he distributed 5,000 copies of *Little White Trip* and that his book was discussed in a newspaper article and on the Internet. Under clear Ninth Circuit law, such limited dissemination is insufficient to establish access as a matter of law.

Second, Plaintiff has not alleged, and cannot allege, that *Cabin* and *Little White Trip* are substantially similar in copyrightable expression. Plaintiff cannot claim a protectable copyright interest in the mere idea of a horror story in which five people travel to a cabin and are terrorized by outside forces. Applying the Ninth Circuit’s “extrinsic test” for substantial similarity to the copyrightable expression in the two works, it is apparent that *Cabin* and *Little White Trip* are not even remotely similar and in fact differ markedly in plot, characters, setting, dialogue, mood, pace, sequence of events, and themes. Thus, Plaintiff cannot establish substantial similarity as a matter of law.

For both these independent reasons, Plaintiff’s First Amended Complaint should be dismissed with prejudice.

II. SUMMARY OF PLAINTIFF’S ALLEGATIONS AND THE WORKS

A. Defendants’ Motion Picture – *The Cabin in the Woods*

Defendants are the writers, producers, and distributors of *Cabin*, which was released in 2012. FAC, ¶¶ 4-8.

1 *Cabin*¹ is a clear parody of horror movies with often broad comedic scenes.
 2 The film opens in the break-room of an underground facility, where two middle-
 3 aged men in office attire, Gary Sitterson and Steve Hadley, joke about Hadley's
 4 family issues. A young woman in a lab coat, Wendy Lin, nervously reports that
 5 "Stockholm went south," and that only their facility and Japan are left. Sitterson
 6 and Hadley brush off her concerns, saying they haven't had a glitch since 1998.

7 The scene shifts to a house in a college town, where nice-girl Dana Polk, pre-
 8 med student Jules Loudon, football players Curt Vaughan and Holden McCrea, and
 9 stoner Marty Mikalski get into Curt's father's RV and take off on a summer trip.
 10 Curt turns the RV into a dilapidated gas station, which looks abandoned until a
 11 creepy old man suddenly appears. Jules asks where Tillerman Road is, and Curt
 12 explains that his cousin bought a house there. The man says it is the old Buckner
 13 place, from which a lot of owners have come and gone. The man insults Jules,
 14 calling her a "whore," and the characters leave. They drive through a mountain
 15 tunnel and soon arrive at a foreboding, ramshackle wooden cabin.

16 Sitterson and Hadley watch the characters' activities on monitors in the
 17 facility's control room. Lin reports that the Chem Department recommends a
 18 chemical increase for Jules Loudon to raise her libido. Sitterson and Hadley act as
 19 bookmakers for an office pool, callously taking wagers from the various facility
 20 departments over which among an array of horrible monsters will kill the students.

21 In the cabin, the friends are playing Truth or Dare when a door in the floor
 22 suddenly pops open, revealing a cellar filled with bizarre artifacts, such as a puzzle
 23 ball. Each of the characters fiddles around with a different object, until Dana starts
 24 reading aloud from the 1903 diary of Anna Patience Buckner, who aspires to torture
 25 and kill as her father and brothers did. Over Marty's protests, Dana reads some

26 _____
 27 ¹ Defendants request the Court to take judicial notice of the two works, which the FAC
 28 incorporates by reference and copies of which are being filed concurrently herewith as Exhibits 1
 and 2 to the Declaration of Elaine K. Kim. Copies of the works, including a paperback copy of
Little White Trip, were also previously filed in support of Defendants' Motion to Dismiss the
 Complaint (Dkt. 11-1 & 12) and are therefore already in the Court's records.

1 Latin phrases from the diary, causing a family of zombies to rise from the grave.
2 Back at the facility, Sitterson announces that Maintenance and the intern have won
3 the pool by betting on the Buckners, the “Zombie Redneck Torture Family.”
4 Hadley laments that he will never see his monster pick—the Merman.

5 When Jules and Curt go into the woods to make out, the male facility
6 employees watch salaciously from the control room. Hadley and Sitterson get Jules
7 to take her top off by releasing pheromone mists. As Curt and Jules are about to
8 have sex, the family of zombies attacks. One zombie catches Jules in the back with
9 a bear claw, and another beheads her with a saw. Upon her death, Hadley pulls a
10 lever in the control room, and blood flows into an outline etched in stone.

11 Marty is relieving himself outside when Curt grabs him and knocks out a
12 zombie girl behind Marty. Back inside the cabin, Curt tells the others that Jules is
13 gone. A zombie throws Jules’s bloody head inside. Curt comes up with a sensible
14 plan to barricade the cabin and for everyone to stay together. Sitterson releases a
15 gas into the cabin, which causes Curt to foolishly instruct everyone to split up.

16 In his room, Marty accidentally breaks a lamp and discovers a camera with
17 wires running up the wall. Fearing that Marty could derail the ritual, Hadley
18 frantically calls for gas to be pumped in, but a zombie gets Marty first and drags him
19 off-camera. Hadley pulls a second lever, and blood flows into an outline of a figure.
20 Another zombie breaks into the cabin and attacks Holden with the bear claw, but
21 Dana saves him by stabbing the zombie. Holden, Dana, and Curt escape in the RV.

22 Back at the facility, Hadley notices that the RV is nearing the mountain
23 tunnel, and that the tunnel is still open. Sitterson demolishes the tunnel just in time
24 to prevent the students’ escape. Curt tries to jump over the canyon on his
25 motorbike, but hits an electric force-field and falls to his death. Holden and Dana
26 turn back in the RV, but Holden is stabbed through the neck by a zombie, and the
27 van crashes into the lake. Dana does not die, however, and swims to the surface.

28

1 Sitterson and Hadley celebrate. When the new security agent at the facility
2 points out that Dana is still alive, they explain that the Virgin's death is optional; it
3 just has to be last. The facility's party comes to a halt when a call from "upstairs"
4 informs Hadley that the Virgin is *not* the only one left. Marty, who did not really
5 die as the facility technicians (and the audience) had thought, rescues Dana from a
6 zombie and leads her to an elevator. The elevator descends, and as it moves
7 sideways, Dana and Marty see numerous glass cubes filled with mythical monsters,
8 including one holding a puzzle ball exactly like the one in the cellar. Dana realizes
9 that, by picking a trinket in the cellar, they "chose" which monsters would kill them.

10 The facility technicians direct security to kill Marty, whose marijuana had
11 immunized him from their chemicals and gases. With the help of a severed zombie
12 arm, Marty and Dana escape a security agent and enter the facility. A voice on the
13 intercom tells them that they are part of something bigger—the facility's task to
14 placate the Ancient Ones. Marty and Dana run into the elevator control booth,
15 where Dana pushes the "System Purge" button. All of the monsters descend
16 through the elevators and slaughter the facility employees in a massive bloodbath.

17 Dana and Marty find the ritual chamber, which contains stone carvings that
18 depict each of the horror archetypes—the Whore, the Athlete, the Scholar, the Fool,
19 and the Virgin. Dana realizes she and her friends were the sacrifice. The facility's
20 female Director, played by Sigourney Weaver, arrives and explains that the ancient
21 gods will remain below so long as young people fitting at least these five horror
22 archetypes are sacrificed, leaving the Virgin for last. The Director tells Marty that if
23 he does not die in eight minutes, the gods will rise and destroy humanity. Dana is
24 about to shoot Marty to save the world, when she is attacked by a werewolf. Marty
25 and the facility Director struggle until the zombie girl strikes the Director in the
26 skull with an ax. The Director and the zombie fall into the pit of the ancient gods.

27 Dana and Marty banter and smoke a joint as they wait for the world to end. A
28 giant hand breaks through the ground and destroys the cabin.

1 **B. Plaintiff's Book – *The Little White Trip: A Night in the Pines***

2 Plaintiff alleges that he wrote *Little White Trip* between 2004 and 2006.
 3 FAC, ¶¶ 13-16. From about June 2006 to November 2007, Plaintiff allegedly
 4 distributed and sold about 5,000 copies of the book, mostly in the Santa Monica and
 5 Venice Beach areas as a result of a grassroots sales effort on the streets. *Id.*, ¶¶ 18,
 6 25; *see also id.*, ¶ 21. Plaintiff alleges that some of the Defendants currently reside
 7 and operate out of Santa Monica. *Id.*, ¶ 20. Plaintiff also alleges that *Little White*
 8 *Trip* was discussed on blogs and social media websites, and in a profile in the Long
 9 Beach Gazette. *Id.*, ¶¶ 18, 23. Plaintiff claims that unnamed “multiple credited
 10 entertainment industry producers . . . expressed interest in the Book.” *Id.*, ¶ 19.

11 *Little White Trip* opens with a note to the reader from Matt Thomas, the
 12 narrator and main character, stating that he witnessed the murders of his friends and
 13 that Peter Gallagher convinced him to tell the story in a book. The story shifts to the
 14 chilly December night of Matt's graduation from high school in Scottsdale, Arizona.
 15 Matt is waiting in line to walk into the ceremony. He sneaks out of line and heads
 16 for his friends' hideout spot, where he meets Sam Canton, “your token fast food
 17 eating, high-stress American”; Julie Burnett, a somewhat spoiled rich girl; and Ian
 18 Shmelts, a cocky rich kid with absentee parents and an alcohol problem. They are
 19 later joined by Dura Lopez, a feisty athletic girl that Matt likes.

20 The graduates mildly disrupt the ceremony by sitting together instead of in
 21 their assigned spots. Afterwards, Matt finds Dura and Sam smoking weed in Dura's
 22 car, and Julie arrives with a very drunk Ian. They go to the graduation party, where
 23 they play carnival games and win money for raffle tickets. Dura dumps a lot of her
 24 tickets into the drawing for the grand prize—an all-expense-paid snowboarding trip
 25 to Flagstaff, Arizona, which includes boarding passes, a cabin, free food, and rental
 26 of a Lincoln Navigator. Julie wins the prize, which she shares with her friends.

27 The following night, on Saturday, Matt meets his friends at the bowling alley,
 28 and they then go to their “secret spot” in the state park, where they smoke marijuana

1 and talk. On Sunday, Matt, Dura, Ian, and Julie meet at a hookah lounge. Later that
2 night, Dura invites Matt over to her house, where they kiss. On Monday morning,
3 the friends leave for Flagstaff in the Lincoln Navigator and stop for breakfast at a
4 diner. About halfway to Flagstaff, Julie gets a call from the rental-car agency saying
5 that she needs to come back to sign a form about liability. Matt arranges to stop by
6 a sister company to sign the form. Sam wants to read the fine print, but an impatient
7 Julie directs him to just sign it. They arrive in snowy Flagstaff by afternoon.

8 The characters go to a steakhouse to use their free-food coupons. A young
9 waiter named Caswell insists they sit in a specific booth. Caswell calls Matt over to
10 the bar and asks where they are going. Matt tells him that they are going to the
11 Brinkley cabin. Caswell laughs and says Matt must be mistaken because the police
12 recently seized the cabin after Jeff Brinkley killed his trophy wife and three kids.
13 Matt thinks Caswell is just trying to scare him, and does not tell the others.

14 The characters follow the directions they received from the rental-car agency
15 and arrive at a cabin. They ask the family there whether it is the Brinkley cabin.
16 The father at first gets angry, but starts to sob and reveals that Brinkley killed their
17 son. Ian is shaken by the story, but Sam points out how unbelievable the story is.

18 The characters finally arrive at a massive “new cabin” with a “four-car
19 garage, thick log columns, castle-style double doors, and an enormous balcony
20 offset above the entryway.” Upstairs, Sam sees a ceiling door, and they climb up to
21 the attic. Matt finds a box with tiny clay dolls, which Julie recognizes as expensive
22 antiques. Julie finds a family photo with the inscription, “The Brinkley Family.”

23 The characters use the cabin’s computer to search the Internet for Brinkley.
24 They find nothing about any murders. Reassured, they barbecue, drink, and get
25 stoned. A man comes to the door, claiming that his tire blew out and that he needs
26 to call a tow service. Ian is skeptical, but Matt gives the man Julie’s cell phone.
27 The man tells Matt and Dura that Brinkley was chased out of town for preaching too
28 much. That night, Matt and Dura have sex on the couch, and Sam sees them.

1 The next morning, Sam refuses to go to the mountain, and the girls insist on
2 leaving the car for him. Matt tries to call a cab using Julie's cell phone but cannot
3 find a signal. Matt wonders how the visitor was able to make calls, and finds no
4 calls in the call history. Matt uses the house line to call a cab. Matt, Dura, Ian, and
5 Julie spend the day snowboarding and having fun at the lodge, and are later picked
6 up by a town car. The driver shares more gory details about the Brinkley murders,
7 scaring the characters. They decide to grab Sam and leave, but when they arrive at
8 the cabin, Sam and the car are gone. Matt and Dura search for Sam in the woods
9 and find the car crashed into a tree. On the passenger seat is Sam's severed arm.

10 Matt and Dura run back to the cabin, where Ian and Julie have discovered that
11 the phone lines have been ripped out. While the four are talking, the kitchen
12 window shatters, and a large man in a flannel shirt stabs Dura in the stomach and
13 abducts her. Matt notices several trails of footprints and deduces there must be at
14 least two more assailants. The three look for knives, but someone has taken them.

15 Ian goes outside to retrieve the car. Hearing Ian's scream, Matt runs to the
16 balcony and sees Jeff Brinkley stabbing Ian repeatedly. Matt races out and knocks
17 Brinkley down. Matt is about to crush Brinkley's head with a piece of firewood
18 when another huge man grabs and chokes Matt until he passes out. When he
19 awakens, Matt creates a makeshift weapon from a broken whiskey bottle. While
20 searching for a knife, Matt knocks over a vase, and he and Julie discover a wireless
21 camera amongst the shards. Just then, Brinkley comes in, and Matt and Julie hide
22 behind a recliner chair. Brinkley begins talking to himself and then leaves. Julie
23 spots a cop car in the driveway, but Matt discovers that the officer inside is dead, his
24 head nearly severed. As Matt reels in horror, Brinkley grabs Julie. Matt lunges for
25 the cop's gun, and Brinkley releases Julie. Matt shoots Brinkley.

26 Matt and Julie then see a woman coming out of the woods and directing
27 someone to stay back. Matt sees that Brinkley is not dead but sitting up. Other
28 people emerge out of the woods, and a short man with a megaphone calls it a

1 “wrap.” Matt listens in shock as this man, Rex Luther, gives an interview to a news
 2 reporter, and describes all the preparations that went into making the “world’s first
 3 full-length reality movie.” Luther reveals that the knives were fake, Brinkley and
 4 everyone else were hired actors, and the rental-car form was actually a release.

5 In the epilogue, set a year and half later, Matt recounts how Julie’s father
 6 hired an attorney to sue the moviemakers and got each of them a settlement of \$9.5
 7 million. Matt gave his parents \$1 million and moved to Hollywood with Dura.

8 **III. RULE 12(b)(6) STANDARDS IN COPYRIGHT CASES**

9 To prevail in a copyright infringement action, a plaintiff must prove
 10 (1) ownership of a copyright in a work and (2) copying by a defendant of original
 11 elements of the work. *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624 (9th
 12 Cir. 2010). “A plaintiff may establish copying either (1) by presenting direct
 13 evidence of copying or (2) by showing that the defendant had access to the work and
 14 that the works at issue are substantially similar.” *Bissoon-Dath v. Sony Comp.*
 15 *Entm’t Am., Inc.*, 694 F. Supp. 2d 1071, 1078 (N.D. Cal. 2010), *aff’d and adopted*
 16 *by*, 653 F.3d 898 (9th Cir. 2011) (published without opinion).

17 Although a court must accept the facts pled as true and draw all reasonable
 18 inferences in favor of a plaintiff on a motion to dismiss, a “court need not accept as
 19 true . . . allegations that contradict facts that may be judicially noticed by the court.”
 20 *Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). When considering a
 21 motion to dismiss an infringement claim for lack of substantial similarity, a court
 22 may “take judicial notice of generic elements of creative works,” as well as
 23 “documents [such as copies of works] which are not physically attached to the
 24 complaint but ‘whose contents are alleged in [the] complaint and whose authenticity
 25 no party questions.’” *Zella v. The E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1128-29
 26 (C.D. Cal. 2007) (internal citation omitted). The Ninth Circuit has long held that
 27 dismissal of copyright infringement claims is proper where the works at issue are in
 28 the record and it is apparent from the pleadings that the works are not substantially

1 similar as a matter of law. *Christianson v. West Publ'g Co.*, 149 F.2d 202, 203 (9th
 2 Cir. 1945); *accord Wild v. NBC Universal, Inc.*, 513 Fed. Appx. 640, 641 (9th Cir.
 3 2013).² This approach is consistent with *Bell Atlantic Corp. v. Twombly*, 550 U.S.
 4 544 (2007), in which the Supreme Court held that a plaintiff must allege “enough
 5 facts to state a claim to relief that is plausible on its face.” *Id.* at 570.

6 Furthermore, courts routinely dismiss copyright infringement claims with
 7 prejudice where substantial similarity is absent. *E.g.*, *Scott v. Meyer*, No. 2:09-cv-
 8 06076-ODW, Order Granting Defendants’ Motion to Dismiss (“MTD Order”) at 4
 9 (C.D. Cal. Nov. 24, 2009) (Wright J.), attached as Exhibit 3 to Declaration of Elaine
 10 K. Kim; *Campbell*, 718 F. Supp. 2d at 1116 (lack of substantial similarity is a
 11 “defect [that] cannot be cured by amendment”); *Thomas*, 2008 U.S. Dist. LEXIS
 12 14643, at *17 (same). That is because the contents of the works at issue cannot be
 13 altered by extraneous allegations. *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430,
 14 434 (S.D.N.Y. 1985), *aff’d*, 784 F.2d 44 (2d Cir. 1986).

15 Courts also dismiss infringement claims under *Twombly* where, as here, the
 16 plaintiff fails allege facts showing that the defendant had access to his work. *E.g.*,
 17 *Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d 357, 365-66 (D.
 18 Mass. 2010) (alleged circulation in Hollywood and book publication not enough to
 19 prevent dismissal); *Hill v. Gaylord Entm’t*, 85 U.S.P.Q.2D (BNA) 1688, 1691-92
 20 (S.D. Fla. 2008) (allegation of sending script to “publishers and literary agents for
 21 possible publication” insufficient to prevent dismissal).

22
 23
 24 ² See also *Van v. Cameron*, 566 Fed. Appx. 615, 615 (9th Cir. 2014); *Gadh v. Spiegel*, 2014 U.S.
 25 Dist. LEXIS 64081, at *23 (C.D. Cal. Apr. 2, 2014); *DuckHole Inc. v. NBC Universal Media*,
 26 2013 U.S. Dist. LEXIS 157305, at *23 (C.D. Cal. Sept. 6, 2013); *Schkeiban v. Cameron*, 2012
 27 U.S. Dist. LEXIS 145384, at *6 (C.D. Cal. Oct. 4, 2012), *aff’d*, 566 Fed. Appx. 616 (9th Cir.
 28 2014); *Campbell v. The Walt Disney Co.*, 718 F. Supp. 2d 1108, 1116 (N.D. Cal. 2010); *Rosenfeld*
v. Twentieth Century Fox Film Corp., 2009 U.S. Dist. LEXIS 9305, at *9-10 (C.D. Cal. Jan. 28,
 2009); *Capcom Co., Ltd. v. The MKR Group, Inc.*, 2008 U.S. Dist. LEXIS 83836, at *34 (N.D.
 Cal. Oct. 10, 2008); *Thomas v. The Walt Disney Co.*, 2008 U.S. Dist. LEXIS 14643, at *17 (N.D.
 Cal. Feb. 14, 2008), *aff’d*, 337 Fed. Appx. 694 (9th Cir. 2009).

1 **IV. PLAINTIFF CANNOT PLEAD SUBSTANTIAL SIMILARITY**

2 **A. The Ninth Circuit’s Extrinsic Test Applies On A Motion to Dismiss**

3 Plaintiff’s copyright infringement claim fails because there is a complete lack
 4 of substantial similarity between the works. To prove that two works are
 5 substantially similar in protected expression, a plaintiff must satisfy both an
 6 “extrinsic” test and an “intrinsic” test. *Funky Films, Inc. v. Time Warner Entm’t,*
 7 *Inc.*, 462 F.3d 1072, 1077 (9th Cir. 2006). Only the extrinsic test is relevant on a
 8 motion to dismiss. *Zella*, 529 F. Supp. 2d at 1133 n. 8. The extrinsic test requires
 9 an “analytic dissection” of the works, and focuses on “specific, concrete elements”
 10 of expression rather than generalizations. *Bissoon-Dath*, 694 F. Supp. 2d at 1079.
 11 The plaintiff must identify “articulable similarities between the plot, themes,
 12 dialogue, mood, setting, pace, characters, and sequence of events” of the two works.
 13 *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 (9th Cir. 1994).

14 Under the extrinsic test, the court must first “filter out and disregard the non-
 15 protectable elements [of each work] in making [a] substantial similarity
 16 determination.” *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).
 17 “[N]o author may copyright facts or ideas.” *Harper & Row Publs., Inc. v. Nation*
 18 *Enters.*, 471 U.S. 539, 547 (1985). “It is an axiom of copyright law that the
 19 protection granted to a copyrighted work extends only to the particular expression of
 20 the idea and never to the idea itself.” *Sid & Marty Krofft Television Prods., Inc. v.*
 21 *McDonald’s Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977). The court “compares, not
 22 the basic plot ideas for stories, but the actual concrete elements that make up the
 23 total sequence of events and the relationships between the major characters.” *Berkic*
 24 *v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985). In addition, “scenes à faire, which
 25 flow naturally from generic plot-lines, are not protectable.” *Funky Films*, 462 F.3d
 26 at 1077. The court “must take care to inquire only whether ‘the *protectable*
 27 *elements, standing alone*, are substantially similar.’” *Id.* (emphasis in original).

1 **B. Plaintiff’s Claim Fails Each Element Of The Extrinsic Test**

2 *Plot.* A court must “look[] beyond the vague, abstracted idea of a general
3 plot” when assessing similarities. *Berkic*, 761 F.2d at 1293. Even where two works
4 “share the same basic plot premise,” no substantial similarity exists where “a closer
5 inspection reveals that they tell very different stories.” *Benay*, 607 F.3d at 625.

6 The plots of the two works here are dissimilar even at an abstract level. The
7 basic premise of *Cabin*—a clear parody—is that, to avoid the apocalypse, society
8 must annually offer the ancient gods a ritual sacrifice of young people who fit
9 certain horror archetypes. Clandestine facilities around the world ensure that the
10 archetypes are killed in accordance with certain horror conventions. In North
11 America, the characters must go to a cabin in the woods, do foolish things, and be
12 killed off by classic horror monsters, with the Virgin left for last. The story is told
13 by cutting between scenes of the technicians in the facility and scenes of the college
14 students selected for this year’s sacrifice. The facility technicians party, wager on
15 death, and generally treat the characters’ terrifying plight as a sporting event until
16 the technicians get their comeuppance.

17 In contrast, *Little White Trip* is largely a coming-of-age story about a group of
18 high school friends who, for the first third of the book, attend their high school
19 graduation, celebrate, have romantic encounters, drink and take drugs, and ruminate
20 about life. Eventually, they drive to Flagstaff, Arizona, on a snowboarding trip,
21 which they have won at a raffle at their graduation party. The characters encounter
22 various people in Flagstaff, who try to convince them that the cabin included in the
23 package was previously owned by a man who murdered his family and was never
24 caught. After numerous interpersonal encounters having nothing to do with the
25 killings, Matt Thomas, the narrator, witnesses what he thinks are the murders of his
26 friends at the hands of this man. In the end, it is revealed that the entire ski trip was
27 being filmed by individuals who want to release it as a movie, and that in fact, no
28 one was killed. There are no monsters, zombies, or end-of-the-world sacrifices.

1 The FAC nevertheless alleges that “[l]ike the Book, the Film tells the story of
 2 five friends (three guys and two girls) between the ages of 17 and 22 who take a trip
 3 to a remote cabin in the woods. The cabin’s previous inhabitants were murdered by
 4 the father of the family, who returns to terrorize the group of friends. In the end, it
 5 is revealed to the friends that they are being filmed and manipulated by persons
 6 behind the scenes, thus becoming inadvertent characters in a real-life horror show
 7 for the enjoyment of others.” FAC, p. 9:20-26. However, the notion of youths
 8 taking a trip to a house in a remote location where they become the unwitting
 9 victims of evil forces is commonplace *scenes à faire* in horror films, from *The Texas*
 10 *Chain Saw Massacre* to *The Evil Dead*. Indeed, the FAC itself alleges that *Cabin*
 11 uses “classic horror movie tropes” (FAC, p. 9:12-13), and Plaintiff’s book even
 12 remarks how “clichéd” its plot is (*e.g.*, p. 285). Plaintiff cannot claim ownership of
 13 such stock ideas and elements. *See Berkic*, 761 F.2d at 1293 (“General plot ideas ...
 14 remain forever the common property of artistic mankind.”); *Funky Films*, 462 F.3d
 15 at 1077 (only “specific details of an author’s rendering of ideas” are protectable).

16 Furthermore, as Plaintiff acknowledges (FAC, p. 9:5-8), the vague concept of
 17 characters being watched and manipulated “for the enjoyment of others” is a non-
 18 copyrightable “idea.” This idea of voyeurism is expressed in completely different
 19 ways in the two works. In *Cabin*, the facility technicians use chemicals and gases to
 20 transform the students into their stock roles for the ritual sacrifice—which is entirely
 21 different from filmmakers trying to make a movie. And in his initial Complaint,
 22 Plaintiff repeatedly asserted that the works are similar because it is revealed only
 23 “[i]n the end,” in a “surprise reveal,” that the characters are being watched and
 24 manipulated. Compl., pp. 9, 10, 14. In fact, there is no such “surprise reveal” in
 25 *Cabin*: The audience knows from the start that the students are being watched, and
 26 watches the students along with the technicians, who are also main characters.

27 Plaintiff’s allegations are also inaccurate and misleading. The characters in
 28 *Cabin* are not terrorized by a man (or an actor) who recently lived in the

1 neighborhood and killed the rest of his family, as Plaintiffs wrongly alleges. Rather,
 2 the *Cabin* characters are attacked by a family of zombies from 1903, and the zombie
 3 children were not innocent victims, but actively participated in the torture and
 4 killing of others. And in *Cabin*, not only are the characters actually killed, they are
 5 killed to save humanity from the gods' wrath.

6 The Ninth Circuit has rejected claims involving far more similar plots than in
 7 the works at issue here. *See, e.g., Benay*, 607 F.3d at 625 (works about American
 8 war veterans who traveled to Japan to train the Japanese army only to fall in with
 9 samurai rebels were not substantially similar); *Funky Films*, 462 F.3d at 1077-78,
 10 1081 (works in which fathers who operate family-run funeral homes die, resulting in
 11 the two surviving sons' operation of the homes, one of whom was estranged prior to
 12 the father's death, were not substantially similar); *Kouf*, 16 F.3d at 1045-46 (family
 13 comedy/adventure films about accidentally shrunken people were not substantially
 14 similar); *Berkic*, 761 F.2d at 1293 (works about "criminal organizations that murder
 15 healthy young people, then remove and sell their vital organs to wealthy people in
 16 need of organ transplants" were not substantially similar). Likewise, *Cabin* and
 17 *Little White Trip* are not substantially similar in plot.

18 **Characters.** "The bar for substantial similarity in a character is set quite
 19 high." *Sheldon Abend Revocable Trust v. Spielberg*, 748 F. Supp. 2d 200, 208
 20 (S.D.N.Y. 2010). Character traits that "flow naturally from [two] works' shared
 21 premises" are not protected. *Benay*, 607 F.3d at 626. "[O]nly distinctive characters
 22 are protectable" (*id.*), and courts must be careful "to slice or filter out" mere
 23 embodiments of stock ideas, *Bissoon-Dath*, 694 F. Supp. 2d at 1088. *See Rice v.*
 24 *Fox Broad. Co.*, 330 F.3d 1170, 1176 (9th Cir. 2003) ("[W]hile there may exist
 25 similarities between the magician 'characters,' any shared attributes of appearance
 26 and mysterious demeanor are generic and common to all magicians.").

27 Plaintiff attempts to compare Dana Polk in *Cabin* with Dura Lopez in *Little*
 28 *White Trip*, but they are nothing alike. Dana Polk is a nice and intellectual red-head

(not “dark-haired” or “brunette,” as Plaintiff alleged in his initial Complaint), and functions as the female Virgin archetype. In contrast, Dura Lopez in *Little White Trip* is half-Dominican/half-Sicilian, with “a soft coffee complexion” and “long brown hair” (p. 24). She is feisty and like “one of the guys” (p. 24). She is athletic and was the star volleyball champ, but frequently smokes marijuana. She has sex with Matt on the trip, and is not the last character to survive, but rather, the second one to be “killed” by the fake murderer. Two characters are not similar just because their names start with the same letter. *See Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1070 (C.D. Cal. 2010) (no substantial similarity of characters though they had the “similar sounding names” “Susan and Suzanne”); *Davis v. ABC*, 2010 U.S. Dist. LEXIS 76145, at *27 (W.D. Mich. July 28, 2010) (no substantial similarity even though main characters in the works were named “Eli and Ely,” another character was named Stanley, and a third was “Ramerez or Ramirez”); *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 311 (S.D.N.Y. 1999) (no substantial similarity where main “half-vampire” characters in the works “share[d] the same name: Nicholas Gaunt”). While Plaintiff alleges that Dana and Dura “recently ended a relationship” and begin “a romantic relationship with the more sensitive and mature male” “which culminates in a love scene in front of the fireplace” (FAC, p. 10:10, 16-19), Dana Polk has just been dumped by her professor, meets Holden for the first time on the trip, and briefly kisses him. In contrast, Dura’s previous boyfriend was a family friend of whom her father approved (p. 84), she develops a relationship with Matt before the trip, and she then has sex with him.

Nor do Holden McCrea (*Cabin*) and Matt Thomas (*Little White Trip*) have anything in common. Holden is smart and fulfills the Scholar role, although he is also a good-looking football player. Far from being a scholar, Matt has “subpar grades” (p. 7). Contrary to Plaintiff’s assertion that Matt is “more sensitive and mature” (FAC, p. 10:16-17), Matt is the class clown who, throughout school, “fought to stay at the center of attention even though many times it landed [his] ass

1 in the principal's office" (p. 4). He "love[s] entertaining" and "love[s] being right
 2 even more" (p. 4). Matt has thick black hair, and a broken nose and blood spots in
 3 his eye from a childhood accident (p. 4). Matt is the narrator of *Little White Trip*,
 4 and is never "killed" off, whereas Holden McCrea is killed by a zombie.

5 Jules Loudon in *Cabin* is a smart pre-med student, but becomes the Whore
 6 archetype. She is the first to be killed while fooling around with her boyfriend Curt.
 7 By contrast, Julie Burnett in *Little White Trip* is no more promiscuous than Dura.
 8 She is a spoiled rich girl who throws tantrums and begins a romantic relationship
 9 with Ian right before the trip starts. Also, she is never "killed," but is one of the
 10 final two remaining. That the characters' names are similar does not give rise to
 11 substantial similarity. *See supra*. Neither do the superficial similarities that they
 12 have blue eyes and blonde hair (because Jules Loudon dyes it just before the trip) or
 13 that they are stereotypically bubbly, because such characters are *scenes à faire* in the
 14 horror/slasher genre including, for example, in the well-known movie *Scream*.

15 Curt Vaughan (*Cabin*) and Ian Shmelts (*Little White Trip*) are not remotely
 16 similar. Curt is a football player who fulfills the Athlete archetype, but is actually a
 17 sociology major on a full academic scholarship. He is not an alcoholic. Ian, in
 18 contrast, is not an athlete, has a chronic alcohol problem, and wears "vintage rags
 19 that cost way too much" (p. 11). He is also resentful because he is well-off (p. 67).
 20 Plaintiff's comparison of them as strong, charismatic, and good-looking (FAC, p.
 21 10:19-20) is legally insufficient. *See Scott v. Meyer*, MTD Order at 5 ("To the
 22 extent that the male protagonists are dashing young men tormented by their powers,
 23 such similarities are far too general to be actionable.").

24 Marty Mikalski (*Cabin*) and Sam Canton (*Little White Trip*) are not similar
 25 either. Marty is supposed to fulfill the Fool archetype, but he is actually the most
 26 observant and serves as the voice of reason. Marty has no romantic interest in any
 27 other character, and is one of the final two to die. *Little White Trip*'s Sam Canton,
 28 in contrast, is the first one to be "killed." Sam is romantically interested in Dura,

1 but discovers that Dura likes Matt. Plaintiff alleges that Marty and Sam have
 2 “quirky personalities” (FAC, p. 10:21), but this abstraction only belies the absence
 3 of any real similarity. In fact, the two have markedly different personalities: Marty
 4 is laid back and does not seem to care about popularity. Sam is “your token fast
 5 food eating, high-stress American” (p. 8), who tried to infiltrate the hip crowd and
 6 join the football team, but never made it because of his bad luck of getting an
 7 erection during the physical exam (pp. 9-10). And although Plaintiff alleges that
 8 Sam is “smart” and “non-athletic” (FAC, p. 10:23), he is no smarter than Ian or
 9 Matt, and none of the male characters in *Little White Trip* is an athlete.³

10 In addition, under the extrinsic test, courts take note of characters with no
 11 counterparts in the other party’s work. *See Funky Films*, 462 F.3d at 1079
 12 (emphasizing characters from defendant’s work who were not present in plaintiff’s
 13 work); *Benay*, 607 F.3d at 627 (“There are a number of important characters in the
 14 Film and the Screenplay who have no obvious parallel in the other work.”). *Cabin*
 15 has many characters with no counterparts in *Little White Trip*, including key
 16 characters such as Sitterson, Hadley, the other facility employees, zombies, and
 17 supernatural monsters. Conversely, *Little White Trip* has many characters with no
 18 counterparts in *Cabin*, such as high school teacher Mrs. Adams, Matt’s parents and
 19 kid brother, the “Mailer family” whose son was purportedly murdered, the late-night
 20 visitor, and the town-car driver. There is no similarity in character in these works.

21 **Setting.** The settings of *Cabin* and *Little White Trip* are likewise vastly
 22 different. *Cabin* takes place primarily in two locations—in and around the cabin in
 23 the woods and in the underground facility—and is set in the summer. Much of *Little*
 24

25 ³ Plaintiff alleges that Marty and Sam “have messy dirty blonde hair, appear to wear a grey shirt
 26 and jeans throughout the film, smoke marijuana, and enjoy gazing up the stars.” FAC, p. 10:21-23.
 27 Having similar hair color or wearing jeans do not make two characters substantially similar, but in
 28 any event, Marty has brown hair, and also wears a blue jean shirt and brown sweater. Curt—who
 Plaintiff does not contend is similar to Sam—wears a grey shirt and jeans for part of the film.
 Plaintiff mischaracterizes *Cabin* in alleging that Marty “enjoy[s] gazing up the stairs”; Marty
 simply looks up at the sky at one point and notices there are no stars. And in *Little White Trip*, it
 is Dura who brings the marijuana, not Sam, and all of the characters in the book smoke it.

1 *White Trip* takes place in Scottsdale, Arizona, where the characters live and attend
 2 their high school graduation and party. On their trip, which occurs in December, the
 3 characters go to Flagstaff, where there are a university, restaurants, markets, other
 4 cabins, and a ski resort where they snowboard.

5 The FAC alleges that “each work takes place in a remote cabin in the woods
 6 lacking cell phone reception, where the prior inhabitants of the cabin were
 7 murdered.” FAC, pp. 9:28-10:1. However, the setting of a horror story in a house
 8 with a violent or mysterious history in an isolated location, so that the victims
 9 cannot easily escape or seek help, is part of the basic formula of horror and not
 10 protectable. And while most remote locations lack cell phone reception, that is not a
 11 story point in *Cabin*; no one even tries to use a phone during the film. That the
 12 names of the prior inhabitants start with the same letter (“Buckner” vs. “Brinkley”)
 13 do not make them substantially similar. *See Davis*, 2010 U.S. Dist. LEXIS 76145,
 14 at *27 (“A name . . . generally is an unprotectible generic element of a work.”).

15 The “cabins” in the two works are nothing alike. In *Cabin*, the house is dark
 16 and spooky, with old rustic furniture, an eerie one-way mirror, and creepy painting.
 17 The “cabin” in *Little White Trip* could not be more different—an eight-room, estate-
 18 style resort with a “hot tub, Internet connection, outdoor heating, theater-quality
 19 entertainment center, and much more” (p. 108), including phones (p. 185). It has
 20 “perfectly placed, expensive-looking furniture,” and is “complete with artwork,
 21 lavish fixtures, and the new-house feel like we were the proud first owners,” and the
 22 air inside is “as clean and fresh inside as it [is] out in the trees” (pp. 135-36).

23 Although Plaintiff alleges that the settings are similar because “[t]he vehicle,
 24 travel, and cabin in each work is filmed, monitored, and manipulated by third
 25 parties, who have planted crew members along the way as well as hidden cameras in
 26 everyday household objects” (FAC, p. 10:2-4), the idea of hidden cameras follows
 27 directly from the idea of being watched by a third person, and is not protectable.
 28 Moreover, the facility employees in *Cabin* do not “film” the college students to

1 make a movie, and there are no “crew members.” Rather, the facility employees
 2 watch the students to ensure that the sacrifice is conducted according to the ancient
 3 gods’ demands. There is no similarity in setting between the works.⁴

4 **Dialogue.** “[E]xtended similarity of dialogue [is] needed to support a claim
 5 of substantial similarity” *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1450 (9th
 6 Cir. 1988). No similarity in dialogue exists between *Cabin* and *Little White Trip*. It
 7 is insufficient that both works use the phrase “come back” or “coming back.” *See*
 8 FAC, p. 18:25-26. *See Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989) (no
 9 copyright protection for common expressions such as “describing a group of family
 10 relationships as a ‘staggering network,’ a muddy street as a ‘cow path’ or a river
 11 bank populated by sluggish, broad-headed loricates as ‘crawling with alligators’”).

12 **Mood.** *Cabin* and *Little White Trip* differ radically in mood. The FAC
 13 alleges that “[b]oth works have a similar mood in that they are suspenseful horror
 14 films that begin with the enthusiasm of a group of friends going on a trip, followed
 15 by the excitement of a night of drinking and romance at a cabin in the woods. The
 16 mood then shifts to a series of frightening murders while at the same time the
 17 friends gradually become aware that they are being manipulated and punished by a
 18 controlling outside force. This culminates in a surprise reveal where the lead
 19 characters learn they are being manipulated for the enjoyment of third parties.”
 20 FAC, pp. 10:26-11:4. This allegation confirms that the only similarity between the
 21 two works is that they involve horror. In *Cabin*, the mood is comical and satirical;
 22 Sitterson and Hadley play practical jokes and dance along with the characters. The

23 ⁴ Courts have repeatedly found no substantial similarity in cases involving far more similar
 24 settings. *See, e.g., Funky Films*, 462 F.3d at 1080 (“Although both works take place in a
 25 contemporary, family-run funeral home, the similarities in setting end there. ‘Six Feet Under’
 26 takes place in a well-maintained funeral home in Los Angeles ... [whereas] ‘The Funk Parlor’,
 27 located in Connecticut, is in shambles.”); *Benay*, 607 F.3d at 627 (no substantial similarity where
 28 both works followed Americans from the United States to seat of the Japanese Emperor due to
 dissimilarities in some specific settings within the works); *Capcom Co.*, 2008 U.S. Dist. LEXIS
 83836, at *29 (no substantial similarity despite both stories taking place in “a rural two-story mall
 with a helipad on top and a gun shop and music playing inside,” because one mall was “relatively
 small with a major department store and an ice rink” while the other was “a modern mega-mall
 without a major department store or ice rink”).

1 killing is less realistic and involves fantastic monsters such as a Merman, werewolf,
 2 and unicorn. It is also less suspenseful, as the audience is fully aware of what the
 3 facility technicians are doing. *Little White Trip*, in contrast, is more serious and
 4 somber in tone, as Matt describes the murders and how they were ill-prepared, and
 5 the reader does not discover that the murders were not real until the end.

6 **Pace.** The FAC alleges that the pace of the works is similar because “[b]oth
 7 are horror films, punctuated with a series of deaths, and enhanced by the unwitting
 8 characters becoming aware that these terrible events are not random, but
 9 orchestrated against them by an unknown force. This is followed by a surprise
 10 reveal that the lead characters are being manipulated for the enjoyment of third
 11 parties.” FAC, p. 11:6-10. Again, this allegation underscores that the only
 12 similarity is that the works involve horror. In the horror genre, a series of character
 13 deaths caused by unknown forces is insufficient to establish similarity of pace. *See*
 14 *Segal v. Rogue Pictures*, 2011 U.S. Dist. LEXIS 157933, at *20 (C.D. Cal. Aug. 19,
 15 2011) (works not similar despite allegation that they “have a dark, foreboding mood
 16 and the pace quickens as harsher events occur as the stories progress,” because this
 17 mood and pace are generic in religious horror).

18 The pace of the two works is highly different. *Cabin* is a fast-paced parody in
 19 which cuts of the college students are interlaced with cuts of frantic facility
 20 employees, and which swiftly proceeds to fast-paced graphic horror. Contrary to
 21 Plaintiff’s allegation that “[e]ach work begins moderately paced, with a focus on
 22 character development and a blossoming relationship” (FAC, p. 11:10-12), in *Cabin*,
 23 almost no time is spent in the students’ college town; they leave almost immediately
 24 for the cabin. There is little character development, and the zombies appear early on
 25 into the film. The entire film takes place over one day, and the three students who
 26 are killed by zombies all die before the third act. The last third of the film follows
 27 Marty and Dana as they fight back against the facility. In contrast, *Little White Trip*
 28 is a slowly unfolding coming-of-age story that has high school kids ruminating

1 about graduation and going on a long road trip. The first third of the book follows
 2 the characters before they arrive in Flagstaff, and involve scenes at their graduation
 3 ceremony and party, their homes, and various hang-out places. The first character is
 4 not “killed” until more than two-thirds into the book, and the narrative promptly
 5 ends after the characters and the reader learn that no one actually died and the trip
 6 was being filmed to be made into a movie.

7 ***Sequence of Events.*** The sequence of events alleged in the FAC completely
 8 disregards key events that occur in each work, including the entire first third of
 9 *Little White Trip*, in which the characters graduate from high school and the two
 10 couples start dating, and the entire third act of *Cabin*, in which Marty and Dana fight
 11 back and release the monsters into the facility. The FAC also ignores the actual
 12 sequence (or any other details) of the deaths, which is important to *Cabin*’s
 13 narrative: Jules (the Whore) dies first, and Marty (the Fool) and Dana (the Virgin)
 14 are the last ones to die, after defeating the facility and triggering the apocalypse. In
 15 contrast, in *Little White Trip*, Sam (who Plaintiff alleges is similar to Marty) “dies”
 16 first, and Matt and Julie (who Plaintiff compares to Holden and Jules) survive.

17 Plaintiff misleadingly alleges that in both works, third persons are monitoring
 18 the characters while they travel to and are in the cabin and that “[t]he people behind
 19 the scenes scramble . . .” when a camera is discovered. FAC, pp. 11-12. In fact, in
 20 *Little White Trip*, the reader does not find out that third persons even exist until the
 21 end; this “surprise reveal” to the reader is a key aspect of the book’s sequence of
 22 events. And, contrary to Plaintiff’s allegation, the characters never suspect that
 23 “some third party [is] controlling the situation.” FAC, p. 12:22. When Julie and
 24 Matt discover the camera, they think they are being watched by the murderer (pp.
 25 252-54), and are completely surprised when crew members reveal themselves in the
 26 end. There is no substantial similarity of sequence of events. *See Funky Films*, 462
 27 F.3d at 1077 (extrinsic test requires analysis of “the actual concrete elements that
 28 make up the total sequence of events”); *Scott v. Meyer*, MTD Order at 6 (“Insofar as

1 both works present a similar sequence of marriage, consummation and child birth,
2 such similarities in stock elements are not actionable.”).⁵

3 **Themes.** The FAC alleges that “[e]ach work has a core theme of horror,
4 resulting from unknowingly being manipulated by third parties,” “for the fulfillment
5 of the narrative requirements and the enjoyment of others.” FAC, p. 9:2-3, 13-14.
6 This alleged similarity would apply to the entire horror genre. And the allegation
7 that the works “display a self-referential awareness of classic horror movie tropes”
8 and “provide[] a commentary on the use of classic horror devices as a mechanism
9 for satisfying consumer desires and expectations” (*id.*, p. 9:12-18) would describe
10 all horror parodies from *Scream* to *Scary Movie*. Such commonplace themes do not
11 render *Cabin* similar, let alone substantially similar, to *Little White Trip*. See *Benay*,
12 607 F.3d at 627 (no substantial similarity although “both works explore[d] general
13 themes of the embittered war veteran, the ‘fish-out-of water,’ and the clash between
14 modernization and traditions,” because “themes ar[o]se naturally from the premise
15 of an American war veteran who travels to Japan to fight the samurai”); *Muller v.*
16 *Twentieth Century Fox Film Corp.*, 794 F. Supp. 2d 429 445 (S.D.N.Y. 2011) (“Any
17 thematic similarities are incidental to the idea of an expedition to a dangerous and
18 remote location, or the stock theme of action-adventure meets science-fiction, and
19 accordingly are unprotected.”).

20 _____
21 ⁵ Plaintiff also alleges that “the friends make a stop which puts them in a tense, almost violent,
22 interaction with an older white male who has been placed there by the watching parties behind the
23 scenes.” FAC, p. 11:20-25. In fact, in *Cabin*, the students make one stop at a gas station, attended
24 by a creepy old man who speaks vaguely and ominously, and whose purpose is to fulfill the stock
25 “Harbinger” role from such classic horror films as *The Texas Chain Saw Massacre*. By contrast,
26 in *Little White Trip*, the characters go to a rental-car lot, a diner, another rental-car place, a
27 steakhouse, a market, and then another cabin where they meet a couple with three kids, who try to
28 convince the characters of the murders (pp. 122-28). Plaintiff also omits that the characters get a
late-night visit from another older man, go snowboarding the next day, and meet another older
man/town-car driver who also tries to convince them about the murders—all before Matt and Dura
finally find Sam’s fake severed arm. These events and sequences are not similar.

Furthermore, although Plaintiff alleges that both works involve a scene in a storage area with
objects, these events are entirely dissimilar: In *Cabin*, the facility technicians pop open the cellar
door so that the students will “choose” a trinket which will determine the monsters that are
unleashed. In *Little White Trip*, the characters happen to find an attic where they find some
objects belonging to the real Brinkley family, not the fake murderer.

1 In fact, *Little White Trip* does **not** “provide[] a commentary on the use of
 2 classic horror devices.” For example, unlike *Cabin*, *Little White Trip* does not
 3 explain why the blonde girl is oversexualized in horror films or why the characters
 4 do foolish things such as read Latin incantations from an old diary. The themes in
 5 the two works differ in other important respects. *Cabin* plays homage to horror
 6 films and also parodies them, and sets the classic horror story against the backdrop
 7 of the destruction of the entire human race. *Little White Trip* is about a group of
 8 high school kids who are tricked and who become older, wiser, and richer as a
 9 result. The works are thematically dissimilar.

10 ***List of Random Alleged Similarities.*** Finally, the list of random similarities
 11 alleged in the FAC (pp. 13-21) does not buttress Plaintiff’s claim, because the Court
 12 must evaluate the actual content of the two works rather than Plaintiff’s
 13 mischaracterizations of them. The Ninth Circuit has held that a “compilation of
 14 ‘random similarities scattered throughout the works’ is ‘inherently subjective and
 15 unreliable.’” *Cavalier*, 297 F.3d at 825; *see Scott v. Meyer*, MTD Order at 5 (noting
 16 “the Ninth Circuit’s directive that district courts be ‘particularly cautious where, as
 17 here, [plaintiff] emphasizes random similarities scattered throughout the works’”).

18 As discussed, many of the alleged similarities in Plaintiff’s list consist of
 19 unprotectable ideas and *scenes à faire*, such as the general plot point of friends who
 20 go to a remote house and are killed by local psychopaths/zombies (Alleged
 21 Similarities Nos. 1, 2, 15, 19, 21, 27), superficial similarities in characters (Nos. 4-
 22 8), and the idea of characters being watched and manipulated (Nos. 3, 32-33). Other
 23 elements in Plaintiff’s list are either abstracted to a level of unprotectable generality
 24 or else mischaracterize the works, so as to concoct similarities where they do not
 25 exist. The remaining alleged “scene similarities” are stock elements and tropes that
 26 flow directly from the tried-and-true slasher/horror story and the abstract idea of
 27 someone watching—*e.g.*, the use of a vehicle to get to the house and hidden cameras
 28 (No. 9), a tense exchange with an older character (Nos. 10-11), an old storage area

1 with strange or unsettling objects (Nos. 12-14), a period of time before the murders,
 2 in which the unsuspecting characters drink, have fun, and make out (Nos. 16-18),
 3 severed body parts (No. 20), failed plans to escape and seek help (Nos. 22-26, 31);
 4 and the characters' discovery they are being manipulated (Nos. 28-30). These ideas,
 5 classic horror tropes, and stock elements are expressed in extremely different ways
 6 in the two works, and cannot sustain an infringement claim. *See Cavalier*, 297 F.3d
 7 at 823 ("Scenes-a-faire, or situations or incidents that flow necessarily or naturally
 8 from a basic plot premise, cannot sustain a finding of infringement.").⁶

9 In sum, *Cabin* and *Little White Trip* are not substantially similar as a matter of
 10 law. Plaintiff's copyright infringement claim should be dismissed with prejudice.

11 **V. PLAINTIFF HAS FAILED TO PLEAD ACCESS**

12 To establish access, Plaintiff must allege that the *Cabin* creators had a
 13 "reasonable possibility" to view or copy *Little White Trip* before they created *Cabin*.
 14 *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984). A
 15 "bare possibility" of access is not enough. *Jason v. Fonda*, 698 F.2d 966, 967 (9th
 16 Cir. 1982). Access "may not be inferred through mere speculation or conjecture."
 17 *Gable v. Nat'l Broad. Co., Inc.*, 727 F. Supp. 2d 815, 827 (C.D. Cal. 2010).

18 Here, there are simply no facts supporting any reasonable possibility that the
 19 creators of *Cabin* had access to *Little White Trip*. Plaintiff alleges that he distributed
 20 and sold about 5,000 copies of his book, primarily in Santa Monica and Venice

22 ⁶ *See, e.g., Berkic*, 761 F.2d at 294 ("depictions of the small miseries of domestic life, romantic
 23 frolics at the beach, and conflicts of ambitious young people on the one hand, and conservative or
 24 evil bureaucracies on the other" are "unprotectable"); *Capcom Co.*, 2008 U.S. Dist. LEXIS 83836,
 25 at *18-*19 (*Dawn of the Dead* film and *Dead Rising* video game not substantially similar, despite
 26 alleged similarities "that: (1) both works are set in a bi-level shopping mall; (2) the mall has a gun
 27 shop, in which action takes place; (3) the mall is located in a rural area with the National Guard
 28 patrolling its environs; (4) both works are set in motion by a helicopter that takes the lead
 characters to a mall besieged by zombies; (5) many of the zombies wear plaid shirts; (6) both
 works feature a subtext critique of sensationalistic journalism through their use of tough, cynical
 journalists, with short brown hair and leather jackets, as a lead male character; (7) both works
 feature the creative use of items such as propane tanks, chainsaws, and vehicles to kill zombies;
 (8) both works are a parody of rampant consumerism; (9) both works use music in the mall for
 comedic effect; and (10) *Dead Rising's* use of the word 'hell' references the tagline for *Dawn of
 the Dead's* release ('When there's no more room in hell, the dead will walk the earth.')").

1 Beach. FAC, ¶ 25. Plaintiff alleges that the Venice Beach boardwalk “encompasses
 2 approximately 2.5 kilometers and receives millions of visitors a year” (*id.*, ¶ 18),
 3 and that some of the Defendants currently reside and operate out of Santa Monica
 4 (*id.*, ¶ 20). However, “[a]s a general matter, in order for a work to be widely
 5 disseminated, it must achieve a high degree of commercial success or be readily
 6 available in the relevant market.” *Loomis v. Cornish*, 2013 U.S. Dist. LEXIS
 7 162607, at *11 (C.D. Cal. Nov. 13, 2013).

8 In *Art Attacks Ink, LLC v. MGA Entertainment Inc.*, 581 F.3d 1138 (9th Cir.
 9 2009), the plaintiff sold about 16,000 t-shirts featuring its “Spoiled Brats” characters
 10 (2,000 per year from 1993 to 2001) at Wal-Mart stores and at Southern California
 11 county fairs, and specifically at the Los Angeles County Fair from 1998 to 2001,
 12 when MGA began selling its “Bratz” dolls. *Id.* at 1141-43. In addition to sales, the
 13 plaintiff displayed its characters at the fairs, which were attended by “millions of
 14 people,” and MGA’s employee even attended the Los Angeles County Fair during
 15 the relevant time period. *Id.* at 1142-44. The Ninth Circuit refused to find access as
 16 a matter of law, holding that, even accounting for the lesser attentional requirements
 17 to view t-shirts as opposed to books, the plaintiff “cannot demonstrate that its
 18 Spoiled Brats designs were widely disseminated to the extent necessary to create
 19 more than ‘a bare possibility’ that MGA had access to the designs.” *Id.* at 1144.
 20 *See also Rice*, 330 F.3d at 1178 (sales of 17,000 copies of plaintiff’s video did not
 21 constitute widespread dissemination); *Jason v. Fonda*, 526 F. Supp. 774, 776 (C.D.
 22 Cal 1981), *aff’d*, 698 F.2d 966 (9th Cir. 1982) (no access as a matter of law although
 23 plaintiff sold up to 700 copies in Southern California, where defendants resided).

24 Plaintiff cannot, as a matter of law, maintain a plausible theory of access
 25 based on alleged discussion about his work on the Internet or in a newspaper (FAC,
 26 ¶¶ 18, 23). Indeed, courts have held that even where the work has been posted on
 27 the Internet, that is insufficient to establish access. *See O’Keefe v. Ogilvy & Mather*
 28 *Worldwide, Inc.*, 590 F. Supp. 2d 500, 515-16 (S.D.N.Y. 2008) (“the mere fact that

[plaintiff's] work was posted on the internet . . . is insufficient by itself" to establish access) (collecting authorities). Nor do articles or other publicity about the work demonstrate widespread dissemination. *See Rice*, 330 F.3d at 1178 (feature about plaintiff's video on television show and in trade publication did not show widespread dissemination); *Kenney v. Warner Bros. Entm't, Inc.*, 984 F. Supp. 2d 9, 12 (D. Mass. 2013) (dismissing claim when plaintiff alleged access "(1) through registration of his screenplay with the Writer's Guild of America; (2) from his 'TheGhostmanMovie.com' website; and (3) his promotion of the work through 'press interviews' and 'media outlets'"); *Feldman*, 723 F. Supp. 2d at 365-66 (promotion on a local radio show, *inter alia*, insufficient to allege access).

Plaintiff's vague allegation that he "was contacted by multiple credited entertainment industry producers" (FAC, ¶ 19) likewise fails to state a plausible theory of access. *See Meta-Film Assocs.*, 586 F. Supp. at 1355-59 (submission to entertainment industry individuals was insufficient to support access as a matter of law, as there was not "a shred of evidence" supporting plaintiff's hypothesis that the defendant creator had seen plaintiff's submission).⁷

VI. CONCLUSION

Plaintiff's FAC fails to plead either of the requisite elements for copyright infringement—access to his work or substantial similarity in copyrightable expression. Any attempt at amendment would be futile, as the works, which are in the record, establish the absence of substantial similarity as a matter of law.

The Court should dismiss Plaintiff's FAC in its entirety, with prejudice.

⁷ *See also Briggs v. Blomkamp*, 2014 U.S. Dist. LEXIS 142016, at *26 (N.D. Cal. Oct. 3, 2014) (no access where plaintiff "posted drafts of the screenplay" on website, "sent queries to agents seeking representation, posted short synopses of the storyline on screenwriter websites, and entered screenwriting competitions," as they did "not constitute evidence of wide dissemination of the screenplay"); *Clay v. Cameron*, 2011 U.S. Dist. LEXIS 153496, at *5 (S.D. Fla. Oct. 20, 2011) (dismissing complaint when "[a]lthough [plaintiff] has alleged that her work was widely circulated, she has alleged no nexus between her circulation of the work . . . and [defendant]"); *Martinez v. McGraw*, 2009 U.S. Dist. LEXIS 69862, at *14 (M.D. Tenn. Aug. 10, 2009) (dismissing infringement claim when Plaintiff did not allege "how his song got into the hands of [defendant's] personnel and songwriters or even that his song was played in hearing range").

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Respectfully submitted,
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